

OCT 17 1984

ALEXANDER L. STEVAS

12 13
Nos. 83-6381 and 83-1660

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

GILL PARKER *et al.*,

Petitioners,

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, *et al.*

CHARLES M. ATKINS, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,

Petitioner,

v.

GILL PARKER, *et al.*

On Writs Of Certiorari To The United States
Court Of Appeals For The First Circuit

**REPLY BRIEF FOR
PARKER, ET. AL.**

STEVEN A. HITOV
(*Counsel of Record*)

J. PATERSON RAE
Western Mass. Legal Services
145 State Street
Springfield, MA 01103
(413) 781-7814

Counsel for Parker, et al.

TABLE OF CONTENTS

	Page
ARGUMENT:	1
I. THE FIRST CIRCUIT CORRECTLY DETERMINED THAT THE FOOD STAMP ACT REQUIRES MEANINGFUL AD- VANCE NOTICE OF THE CHANGES AT ISSUE HERE ...	1
II. THE FIRST CIRCUIT CORRECTLY DETERMINED THAT THE CONSTITUTION REQUIRES MEANINGFUL ADVANCE NOTICE OF THE REDUCTIONS AT ISSUE HERE	6
III. THE FIRST CIRCUIT ERRED IN REVERSING THE RELIEF AFFORDED BY THE DISTRICT COURT	12
A. The Prospective Injunctive Relief	12
B. Restoration Of Wrongfully Withheld Benefits	14
CONCLUSION	21
APPENDIX A	1a

TABLE OF AUTHORITIES

CASES:	Page
<i>Arkansas Electric Co-op Corp. v. Arkansas Public Commission</i> , ____ U.S. ____, 103 S. Ct. 1905 (1983) ..	7
<i>Army and Air Force Exchange Service v. Sheehan</i> , 456 U.S. 728 (1982)	19, 20
<i>Budnicki v. Beal</i> , 450 F. Supp. 546 (E.D. Pa. 1978) ..	9
<i>Califano v. Yamasaki</i> , 442 U.S. 682 (1979)	7
<i>Cardinale v. Mathews</i> , 399 F. Supp. 1163 (D.D.C. 1975)	9
<i>Carey v. Phipus</i> , 435 U.S. 247 (1978)	20
<i>Chavis v. Heckler</i> , 577 F. Supp. 201 (D.D.C. 1983) .	18, 20
<i>Complaint of American Export Lines</i> , 73 F.R.D. 454 (S.D.N.Y. 1977)	16
<i>David v. Heckler</i> , 79 C 2813 (E.D.N.Y. 7/11/84)	5
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974)	20
<i>Eder v. Beal</i> , 609 F.2d 695 (3d Cir. 1979)	9
<i>Federal Crop Insurance Corp. v. Merrill</i> , 332 U.S. 380 (1947)	18
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125 (1976) ..	6
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	7, 9, 10
<i>Hoffman v. Joint Council of Teamsters</i> , 230 F. Supp. 684 (N.D. Cal. 1962)	16
<i>Levesque v. Block</i> , 723 F.2d 175 (1st Cir. 1983)	15, 16
<i>Levesque v. Block</i> , C 82-437-L (D.N.H. 3/31/83 and 4/28/83)	16
<i>Malanson v. Wilson</i> , 79-116 (D. Vt. 8/12/80) (unreported)	5
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	7, 10, 11
<i>N.L.R.B. v. Brown</i> , 380 U.S. 278 (1965)	6
<i>O'Bannon v. Town Court Nursing Center</i> , 447 U.S. 773 (1980)	9
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981)	11
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330 (1979)	17
<i>Richardson v. Belcher</i> , 404 U.S. 78 (1971)	8
<i>Sampson v. Murray</i> , 415 U.S. 61 (1974)	17, 18
<i>Schweiker v. Hansen</i> , 450 U.S. 785 (1981) (<i>per curiam</i>)	18

Table of Authorities Continued

	Page
<i>S.E.C. v. Sloan</i> , 436 U.S. 103 (1978)	6
<i>Skidmore v. Swift & Co.</i> , 323 U.S. 134 (1944)	6
<i>Smith v. Ithaca Corp.</i> , 612 F.2d 215 (5th Cir. 1980) ..	16
<i>United States v. Clark</i> , 445 U.S. 23 (1980)	19
<i>United States v. Menasche</i> , 348 U.S. 528 (1955)	17
<i>United States v. Mitchell</i> , ____ U.S. ____, 103 S. Ct. 2961 (1983)	19, 20
<i>United States v. Testan</i> , 424 U.S. 392 (1976)	19, 20
<i>Uptagrafft v. U.S.</i> , 315 F.2d 200 (4th Cir.), <i>cert. denied</i> , 375 U.S. 818 (1963)	1
<i>Vargas v. Trainor</i> , 508 F.2d 485 (7th Cir. 1974), <i>cert.</i> <i>denied</i> , 420 U.S. 1008 (1975)	5
<i>Walker v. City of Birmingham</i> , 388 U.S. 307 (1967) ..	13
CONSTITUTION, STATUTES, REGULATIONS AND RULES:	
U.S. Const. Amend. XI	19, 20
Food Stamp Act of 1977, Pub. L. 95-113, Tit. XIII, 91 Stat. 958, 7 U.S.C. § 2011 <i>et seq.</i> :	
7 U.S.C. § 2013(a)	20
7 U.S.C. § 2013(c)	15
7 U.S.C. § 2014(g)	1
7 U.S.C. § 2020(e)(10)	<i>passim</i>
7 U.S.C. § 2020(e)(11)	16, 17
7 U.S.C. § 2023(b)	16, 17, 18, 19
Omnibus Budget Reconciliation Act of 1981, Pub. L. 97- 35, § 117	15
Pub. L. 97-253, § 166 (1982) <i>amending</i> 7 U.S.C. § 2020(d)	14
7 C.F.R.:	
Section 271.1(n)(3)(1975)	3, 4
Section 272.1(g)(16)(ii)	15
Section 273.12(e)(1)	3
Section 273.12(e)(1)(i)	2

Table of Authorities Continued

	Page
Section 273.12(e)(1)(ii)(1981)	2, 3, 4
Section 273.12(e)(2)	3
Section 273.12(e)(2)(ii)	2, 3, 4, 5
Section 273.12(e)(3)(ii)	15
Section 273.15(a)	17
Section 273.15(k)(1)	14
 MISCELLANEOUS:	
36 Fed. Reg. 20146 (October 16, 1971)	15
39 Fed. Reg. 25996 (July 15, 1974)	4
43 Fed. Reg. 18896 (May 2, 1978)	4
46 Fed. Reg. 44719 (September 4, 1981)	2
H.R. Rep. 95-464, 95th Cong., 1st Sess. (1977)	1
Sen. Conf. Rep. 95-418, 95th Cong., 1st Sess. (1977) ..	2
Hse. Conf. Rep. 95-599, 95th Cong., 1st Sess. (1977) .	2

POINT I

THE FIRST CIRCUIT CORRECTLY DETERMINED THAT THE FOOD STAMP ACT REQUIRES MEANINGFUL ADVANCE NOTICE OF THE CHANGES AT ISSUE HERE

The court of appeals held that 7 U.S.C. § 2020(e)(10) requires “meaningful advance notice” of all reductions or terminations of a household’s food stamp benefits except where such agency action is based upon a written statement received from the household itself [PA 29-30]. Nonetheless, the Secretary now proposes explicitly what was only implied in his earlier brief, *i.e.*, that the 1977 amendment to § 2020(e)(10) did nothing more than adopt his existing regulations.¹ Since those regulations did not require meaningful notice, the argument goes, neither does the statute. This contention is proffered despite the fact that, as the Secretary admits (reply br. at 12), the amendment introduced a term, “individual notice of agency action”, which did not exist in the regulations.² The

¹ This suggestion does not respond to the fact that, as plaintiffs pointed out in their first brief (at 25-26), Congress has in other sections of the Act stated that it was adopting the Secretary’s regulations when it chose to do so. *See, e.g.*, 7 U.S.C. § 2014(g). No such intention is mentioned in § 2020(e)(10).

² It is not disputed that Congress amended § 2020(e)(10) in 1977 by adding the language at issue in this case. Since legislative amendments are not to be considered superfluous undertakings, *Uptagrafft v. U.S.*, 315 F.2d 200, 204 (4th Cir.), cert. denied, 375 U.S. 818 (1963), it must be presumed that the Congressionally enacted change accomplished something. If, as the Secretary contends, Congress was perfectly satisfied with his existing procedures, it is difficult to perceive why it at the last minute decided to amend this pre-existing section of the Act at all. When the “legislative history” relied upon by the Secretary (H.R. Rep. 95-464) was written in 1976, certainly no such change was contemplated. (*See* plaintiffs’ main brief at 26.) Contrary to the Secretary’s suggestion (reply br. at 13 n.6), it was not only the description of the existing regulations that was written before § 2020(e)(10) was amended, but also the portion of the Report entitled “Committee Action.” Thus, the only legislative history written with the amendment to § 2020(e)(10) in mind, and consequently the only language that can elucidate the meaning of that amendment,

argument suggests a novel approach to statutory construction that requires an act of Congress to be read to conform with existing agency regulations, rather than the usual approach which dictates that agency regulations be judged within the parameters of the act they are promulgated to implement. No authority is offered in support of this suggestion, almost certainly because none exists. Further, inspection of the purported regulatory foundation for the Secretary's argument reveals its inherent instability.

In his effort to belittle the significance of the 1977 amendment to § 2020(e)(10), and the "individual notice" regulation that he promulgated in response thereto in 1978, the Secretary has been forced to ignore distinctions that exist in his own regulatory system. Throughout his reply brief, the Secretary equates the "individual notice" added to the regulations in 1978 (7 C.F.R. § 273.12(e)(2)(ii)) with the "general notice" that has been in the regulations since 1974.³ *See e.g.*, reply br. at 14. However, the regulations themselves, as well as the Secretary's comments upon their promulgation, make clear that these two types of notice are entirely distinct and are designed to serve different purposes.

is the Conference Committee Report (Sen. Rep. 95-418; Hse. Rep. 95-599, 95th Cong., 1st. Sess. (1977)) which emerged from the reconciliation of the Senate and House versions of the 1977 Act. That report makes clear that Congress was not merely adopting terms of art already contained in the existing regulations.

³ Until September 4, 1981, the provision for general notice was found in 7 C.F.R. § 273.12(e)(1)(ii). The text of that section is quoted in the body of this brief, *infra* at 3. In promulgating the regulations designed to implement the OBRA changes of 1981, the Secretary made some technical amendments to § 273.12(e)(1)(i). 46 Fed. Reg. 44719 (9/4/81). In doing so, he seems to have inadvertently deleted § 273.12(e)(1)(ii) from his regulations. If the deletion was not inadvertent, it was certainly without explanation or comment. 46 Fed. Reg. 44719. Plaintiffs will refer to § 273.12(e)(1)(ii)(1981) as if it still exists, but whether or not that is true has no bearing on the force of their argument, for that section unquestionably existed simultaneously with § 273.12(e)(2)(ii)(the "individual notice" provision) at least from 1978 through 1981.

That "individual" and "general" notices are distinct entities is established by the language of § 273.12(e)(1)(ii)(1981) itself, which sets forth the implementation procedures to be used in effectuating certain types of federal adjustments to benefit levels. It provides in relevant part:

Although a notice of adverse action is not required, State agencies *may* send an individual notice to households of these changes. State agencies *shall* publicize these mass changes through the news media; posters in certification offices, issuance locations, or other sites frequented by certified households; or general notices mailed to households. (emphasis added)

From the above language, it is obvious that individual and general notices are different. Use of the former is permissive for the types of mass changes covered by § 273.12(e)(1), while it is mandatory for the changes addressed by § 273.12(e)(2). See § 273.12(e)(2)(ii) and plaintiffs' main br. at 28 n.16. In contrast, use of a general notice, or the listed alternatives, is mandatory to announce the types of changes covered by § 273.12(e)(1).⁴ This entire section makes absolutely no sense if, as the Secretary now professes, the two terms are interchangeable.

Further, the Secretary's new-found position is inconsistent with his (or his predecessors') earlier understanding of the purposes of the two types of notice. When the concept of general notice was first introduced in 1974 in 7 C.F.R. § 271.1

⁴ The language of § 273.12(e)(1)(ii)(1981) also undoes the Secretary's contention (reply br. at 9-10 n.4) that "[i]ndividual notice simply means notice provided to each individual household; the term indicates that general notice to the public through the Federal Register or the mass media is not sufficient." As the language of § 273.12(e)(1)(ii) makes clear, general notice is not synonymous with federal register or mass media notice, it is an alternative to them, one that must be "mailed to households." See also, 7 C.F.R. § 271.1(n)(3)(1975), as quoted in the Secretary's reply br. at 12. Thus, the Secretary's "interpretation" negates any distinction between general and individual notice and renders meaningless their separate existence in §§ 273.12(e)(1)(ii)(1981) and 273.12(e)(2)(ii), respectively.

(n)(3)(1975), the Secretary stated that it was intended to "provide households in a reasonable manner with an indication that *some change in their program status* should be expected." 39 Fed. Reg. 25996 (July 15, 1974)(emphasis added). Thus, this provision, which was promulgated well before 7 U.S.C. § 2020(e)(10) was amended to require individual notice, was certainly designed to achieve only a very modest goal. However, following the amendment to § 2020(e)(10), the Secretary promulgated new "mass change" regulations which left intact the concept of general notice (7 C.F.R. § 273.12(e)(1)(ii)(1981)) but added, for the first time, a category of changes that had to be implemented pursuant to an "individual notice" (§ 273.12(e)(2)(ii)). The function of the new individual notice, the Secretary then stated, was to make certain that "households are advised of the change and can adjust household [sic] budgets *accordingly*" (emphasis added). 43 Fed. Reg. 18896 (May 2, 1978). Naturally, for a poor family, the necessary adjustment to its budget will certainly differ if the proposed decrease is \$2.00 or \$50.00. Consequently, unless an individual notice informs a household of at least the amount of any impending reduction, the just-quoted contemporaneous interpretation of the Secretary is stripped of meaning, for it would be impossible for a family to budget in accord with an unknown factor. In view of the above, it can be seen that the Secretary's current reading of his regulations is inconsistent not only with their language, but also with his earlier pronouncements regarding them.

Nonetheless, in support of his current restrictive view of his regulations, the Secretary contends that notice need only inform a household that some change is going to occur, and then tell it where to look for further information (reply br. at 26). There are several problems with the Secretary's current viewpoint, aside from the fact that, as discussed above, it conflicts with his earlier position. First, it is inconsistent with the language of 7 C.F.R. § 273.12(e)(2)(ii) that a household's "benefits shall be continued at the former level" if the issue

being appealed is that its benefits were improperly computed.⁵ If, in order to discover a computational error, a household must wait until it has been reduced and then seek out and scour its case file to determine the basis for the reduction, it is difficult to discern how its benefits can "be continued at the former level." At best, those benefits could be reinstated, a concept envisioned neither by 7 C.F.R. § 273.12(e)(2)(ii) nor 7 U.S.C. § 2020(e)(10).

Second, such attempts to shift the burden of acquiring adequate notice onto program participants have been specifically rejected by numerous courts. In *Vargas v. Trainor*, 508 F.2d 485, 490 (7th Cir. 1974), the court noted that "[u]nder such a procedure only the aggressive receive their due process right to be advised of the reasons for the proposed action." The court in *David v. Heckler*, #79 C 2813 (E.D.N.Y. 7/11/84), slip op. at 32, reached exactly the same conclusion, noting additionally that "it is doubtful that the infuriating problem of gaining telephone access to, and satisfaction from, any bureaucracy has been solved . . ." *David*, slip op. at 33. And in *Malanson v. Wilson*, #79-116 (D. Vt. 8/12/80), slip op. at 12, the court rejected such a come-in-for-further-information approach because it "improperly places on the recipient a burden of acquiring notice whereas due process directs defendant to supply it. . . ." In the present case, both the statute and applicable regulations direct the defendants to supply notice, and the Secretary's invitation to households to go and rummage through their case files for information does not constitute an adequate substitute for that directive.

Finally, the record here indicates that calling for information about one's case, or even looking in one's file, would not result in finding any information of value. As noted in Parker's main brief (at 8), Ms. Johnson, Mr. Parker and Ms. Zades all called

⁵ The Secretary misreads his own regulation when he contends that § 273.12(e)(2)(ii) limits the availability of a *fair hearing* to those cases alleging a miscomputation of benefits (reply br. at 10 n.5). The regulation makes clear that a fair hearing is always available. It is continued benefits that are only available if a household alleges a computational error.

their caseworkers to no avail. Further, Ms. Johnson and Ms. Zades each won their subsequent hearings because their files did not contain sufficient information to explain the basis for the proposed reductions. Nor, unfortunately, are the experiences of these plaintiffs unique or even unusual. As the *amicus* brief of the National Anti-Hunger Coalition points out all too clearly (at 9 nn.6 and 7), inattention to clients caused by increasing caseloads and decreasing staff levels is becoming the norm, not the exception. In view of this, the Secretary's contention that it is sufficient to allow households to check their files to determine if they have been improperly treated is not only wrong as a matter of law, but also ineffective as a matter of fact.

Consequently, it can be seen that the Secretary's current reading of his regulations is inconsistent both with his predecessors' earlier statements and the language of those regulations themselves. Further, his limited view of the purpose of notice within the Food Stamp Program does not comport with that exhibited by Congress in amending 7 U.S.C. § 2020(e)(10) to add the specific provisions at issue here. In light of all of these factors, the Secretary's interpretation of the Act is not entitled to significant deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976); and *S.E.C. v. Sloan*, 436 U.S. 103, 118 (1978). Rather, the Court should exercise its authority as the final arbiter of issues of statutory construction, *N.L.R.B. v. Brown*, 380 U.S. 278, 291 (1965), and affirm the decision of the First Circuit that § 2020(e)(10) requires "meaningful advance notice" of the type of food stamp reductions at issue here.

POINT II

THE FIRST CIRCUIT CORRECTLY DETERMINED THAT THE CONSTITUTION REQUIRES MEANINGFUL ADVANCE NOTICE OF THE REDUCTIONS AT ISSUE HERE

In light of the plaintiffs' clear statutory entitlement to meaningful advance notice demonstrated in our main brief (at 22-30) and in Point I, *supra*, it is as inappropriate for this Court

to reach the respondents' constitutional issues as it was for the First Circuit to do so.⁶ Nonetheless, the constitutional conclusion drawn by the court of appeals, although unnecessary, was substantively correct. In his effort to attack the reasoning and decision of the First Circuit, the Secretary, although claiming no such intention, necessarily asks this Court to overrule its decision in *Goldberg*. Failing that, he suggests that *Mathews v. Eldridge*, 424 U.S. 319 (1976), be ignored and that

⁶ Both respondents argue that because the court of appeals reached its remedial conclusions within a constitutional context, it is therefore incumbent upon this Court to consider the constitutional issues in order to address the propriety or impropriety of the relief afforded. This contention has no merit. It was exactly the First Circuit's mistake that, having found a statutory violation, it looked to the Constitution rather than the violated statute for the appropriate remedy. The plaintiffs' Petition claims that they are statutorily, not constitutionally, entitled to the relief afforded by the district court. Despite the Secretary's implication to the contrary (reply br. at 8), it is perfectly appropriate for this Court to now address the statutory relief question even though the court of appeals did not do so. That is precisely what was done in *Califano v. Yamasaki*, 442 U.S. 682 (1979), where the lower court decisions never even discussed the statutory violation, much less the relief to be afforded as a result thereof.

Equally unpersuasive is the state respondent's claim that the constitutional issues must be reached because 7 U.S.C. § 2020(e)(10) was allegedly enacted in response to *Goldberg v. Kelly*, 397 U.S. 254 (1970) (reply br. at 13, 23-24). First, the factual premise of this argument is wrong. As pointed out in our main brief (at 25 n. 14), only the first clause of § 2020(e)(10) was enacted in response to *Goldberg*. The second clause, upon which plaintiffs rely, was not added until six years later. Further, contrary to the state respondent's suggestion, it is not the rule of this Court that it may ignore the language of an act of Congress passed in response to an earlier constitutional decision of the Court, and continue to consider subsequent issues in the regulated area pursuant to the old constitutional, as opposed to the new statutory, standard. The case relied upon by the Commonwealth for this proposition actually states exactly the opposite conclusion. *Arkansas Electric Co-op Corp. v. Arkansas Public Commission*, ___ U.S. ___, 103 S. Ct. 1905, 1909-10 (1983).

the notice issued here be found constitutionally sufficient. There is neither legal nor logical support for either of these approaches.

In arguing that no notice at all is due when reductions or terminations are undertaken to effectuate statutory mandates, the Secretary continues to confuse the concepts of substantive and procedural due process, and fails to recognize that only the latter is at issue here. This failure to grasp the actual issue is perhaps best demonstrated on page 19 of the Secretary's reply brief, where he cites *Richardson v. Belcher*, 404 U.S. 78, 81 (1971), for the proposition that "due process hearing rights 'cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.' " *Richardson* says no such thing. The very sentence that is misleadingly quoted by the Secretary starts with the words: "But there is no controversy over procedure in the present case, . . ." Rather, the sentence continues, it is the "analogy . . . between social welfare and 'property' " that cannot be stretched to impose a constitutional limitation. In its excellent discussion of the Secretary's contention that the purportedly correct reduction of a substantive entitlement strips one of his or her procedural rights, the First Circuit recognized that adoption of such a position inexorably leads to the conclusion that virtually no one will ever get notice of any reduction [PA 12-14].⁷

Rather, the court of appeals correctly concluded that notice and an opportunity to contest would only be unnecessary where an entire program was terminated, for then there would be no individual factual underpinnings involved. This, contrary to the Secretary's contention (reply br. at 19), is the import of

⁷ The Secretary offers no response to this point. Nor does he meaningfully reply to plaintiffs' claim (br. at 50) that his theory would also deprive incorrectly reduced households of a hearing, as well as notice. The Secretary baldly states (reply brief at 19-20) that no such result would follow, but suggests absolutely no constitutional basis upon which a household with no protected property interest could demand to be heard to protest the "loss" of that nonexistent interest.

Justice Blackmun's concurring opinion in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 798 (1980), where it was stated that:

... the property of a recipient of public benefits must be limited, as a general rule, by the governmental power to remove, *through prescribed procedures*, the underlying source of those benefits. (emphasis added)

The emphasized language above highlights the problem with the Secretary's analysis. It is not Congress' decision to reduce the substantive benefit that is challenged here; it is the adequacy of the procedures utilized by the Department of Public Welfare to implement that reduction. The Secretary's attempt to blur the distinction between these two issues in order to accomplish a major restriction of the process due vulnerable participants in this nation's various benefit programs is neither analytically helpful nor previously untested. In fact, numerous courts have explicitly rejected the argument, and easily distinguished the cases, here proffered by the federal government. They have found that if application of a new provision of law entails consideration of underlying individual facts,⁸ the right to meaningful notice and an opportunity to contest attach. *Cardinale v. Mathews*, 399 F. Supp. 1163, 1172 (D.D.C. 1975); *Budnicki v. Beal*, 450 F. Supp. 546, 555 (E.D.Pa. 1978). See also, *Eder v. Beal*, 609 F.2d 695, 701-702 (3d Cir. 1979), as well as cases cited in our main brief at 58-59. Consequently, the Secretary's attempt to have this Court overrule the aspect of *Goldberg* (397 U.S. at 268) that requires procedural protection against "incorrect or misleading factual premises" and

⁸ The individual facts at issue here for each victim of the proposed reduction were whether they actually had any earned income at all to be counted (the named plaintiff below, Karen Foggs, and the family revealed in the record at JA 44 did not) and, if so, the accuracy of the amount of earned income being counted by the Department. Only by knowing the latter figure could a household determine whether the amount of the change in its allotment was likely to be correct; for if the earned income figure was not accurate, any pre-existing error in the grant calculation would be magnified by the impending recalculation, thus resulting in an additional incorrect reduction of the household's benefit.

"misapplication of rules or policies to the facts" of a case should, once again, be rejected.

The respondents' fall-back position appears to be that if the Court is not willing to overrule *Goldberg*, it should at least ignore the analytical formula set forth in *Eldridge*, which, we are told, should not be applied in notice cases (Secretary's reply brief at 24 n.19). This is so, it is argued, because *Eldridge* is "essentially a cost-benefit standard" (*ibid.*) and the provision of notice will often entail "no injury to governmental interests" (Secretary's main brief at 36 n.31). The "undesirable" result of these two facts is apparently that since it frequently will cost nothing extra to provide adequate notice, such notice will almost always be required. Seeking to avoid such an untoward result, the respondents would seemingly have this Court apply *Eldridge* where the administrative burden involved militates against further procedural protections, but not where the absence of any burden suggests that further useful procedures should be employed. This contention is nothing short of a result-oriented analysis designed to ensure that procedural protections beyond those chosen by administrators in a given case are never required. But the *Eldridge* test cannot be so selectively embraced and discarded. If the individual interest at stake is significant and there is a substantial risk of error involved in accomplishing a given change,⁹ it is

⁹The Secretary's continued *post facto* attempts to belittle the errors that occurred in this case are unavailing. His statement that there is no support in the record for the plaintiffs' claim that the *minimum* error rate was actually higher than found below because of the inclusion of some incorrectly provided data is simply wrong (reply br. at 21). A document submitted by the Department of Public Welfare itself, AP-ADM 81-79 [JA 62], unequivocally establishes that no household listed under error code B (the improperly considered data below) experienced any reduction in its benefits. Therefore, plaintiffs' demonstration that the *minimum* error rate was actually higher than projected (br. at 54) is entirely accurate.

Further, the Secretary resorts to a tautology in his attempt to explain away the family with no earned income [JA 44] that was nonetheless terminated from the program. Because they had no

exactly the point of *Eldridge* that additional useful procedures are mandated unless it would impose an unacceptable burden upon the government to provide them. As no such burden was found or ever claimed in this case, *Eldridge* dictates that the provision of adequate notice ordered below was appropriate.

In a final attempt to undermine the decision of the First Circuit, the Secretary proffers an apparently obligatory "floodgates" argument. If due process requires meaningful notice here, he states, then such notice would be required every time the government issues a check, provides a benefit or makes a calculation (reply br. at 25). This contention ignores the balancing test set forth in *Eldridge*, as well as this Court's holding in *Parratt v. Taylor*, 451 U.S. 527 (1981). By definition, *accidental* deprivations of property by the government cannot be predicted, and therefore advance notice of them is not possible, much less required. This reality, however, does not lead to the conclusion that no notice is due when the government *intends* to deprive one of property, and predictab-

earned income, he argues (reply br. at 22 n.17), they could not have been terminated because of the earned income disregard. Only by assuming the conclusion in the premise does this "argument" make sense. In logic this is known as a tautology; in law it is called obfuscation. In fact that family was incorrectly terminated because of the misapplication of the earned income disregard change. The separate minimum benefit error could have had no effect. If the household was correctly receiving \$10.00 per month before the proposed change at issue here, then, pursuant to the minimum benefit rule, it was by definition entitled to some amount of benefits between \$1.00 and \$10.00 per month. If, prior to the proposed change, the family had been eligible for no benefits, it simply would not have been on the program. Therefore, if, as the Secretary argues, the household's reduction resulted from the Department's failure to reinstate the minimum benefit rule following the earned income change, the household's allotment would have been listed as some number under \$10.00 but, by definition, over zero. The fact that the family was indeed terminated demonstrates that, by purportedly applying the new earned income disregard to a family listed as having no earned income, the Department somehow managed to reduce that family's grant.

ly will make mistakes in doing so. It is only the latter situation that was addressed by the courts below, and it is only that situation that would be affected by the decision of this Court.

Consequently, it can be seen that none of the arguments raised by the respondents to attack the decision of the First Circuit can bear scrutiny. As such, were this Court to reach the constitutional question, the decisions below should be affirmed.

POINT III

THE FIRST CIRCUIT ERRED IN REVERSING THE RELIEF AFFORDED BY THE DISTRICT COURT

Following a two day trial, and based upon over one-hundred findings of fact and conclusions of law, the district court entered an order directing the state defendant to include in future food stamp reduction notices sufficient information to make them useful to their recipients [PA 103-104]. In addition, the state defendant was instructed to draft regulations, subject to court review, regarding the legibility and comprehensibility of those notices [PA 102]. Finally, the defendants were ordered to restore to the plaintiff class those benefits which had been withheld in violation of the provisions of 7 U.S.C. § 2020(e)(10) [PA 101]. Because this relief did not constitute an abuse of the district court's broad equitable discretion, it was improper for the First Circuit to substitute its remedial preferences for those of the trial court.

A. The Prospective Injunctive Relief

Only the state defendant takes issue with the district court's decree concerning the contents of future notices. He argues that because he is a governmental defendant, only a declaration, and not an injunction, is necessary to ensure his future compliance (reply br. at 48-49). He nonetheless is forced to admit that a recently issued mass change notice prompted by this year's social security cost-of-living increases did not provide "sufficient information . . . to determine whether the individual who received that notice was in fact erroneously deprived of benefits" (reply br. at 52-53 n.35). It is just such

information, however, that both the district court and court of appeals declared had to be contained in future notices of food stamp reductions [PA 102-103, ¶ 4; PA 21]. Whatever the ultimate wisdom of the First Circuit's decision, the Commissioner did not seek nor obtain a stay of its mandate. Rather, he merely, and admittedly, ignored it. This Court has held that such conduct is not to be condoned. *See Walker v. City of Birmingham*, 388 U.S. 307, 320-321 (1967). While *Walker* involved the violation of an injunction, not a declaration, pending appeal, that is a distinction that the Commissioner contends is immaterial with regard to his compliance. Unfortunately, he has just demonstrated that it is not, and has thereby confirmed the propriety, if not necessity, of the injunction issued by the district court.

With respect to the legibility and comprehensibility issue, the defendants first mischaracterize the scope of the district court's order and then argue that it was properly reversed because the district court "assumed an unwarranted degree of judicial control over the rulemaking result."¹⁰ Fed. reply br. at 40; state reply br. at 55. The Commissioner further protests that the mandate that he develop standards for the comprehensibility of future notices would subject him to a never-ending threat of contempt (reply br. at 49-50). However, inspection of the district court's order demonstrates that neither contention is correct.

By instructing the Department to develop its own plan (in the form of draft regulations) to ensure the future comprehensibility of notices, the court afforded the state defendant the

¹⁰ The Secretary again assumes his conclusion without any analysis. The state defendant goes further and misstates, without reference to the record, the holding on the comprehensibility and legibility issue. Contrary to the Commissioner's assertion, the district court never "concluded that Due Process requires . . . notices to be printed no smaller than eight-point type, with a mixture of upper and lower case letters, and written for a person with a fifth-sixth grade reading capacity" (reply br. at 44 n.31). Nor did the court dictate the manner in which the Department by regulation might ensure that future notices would be legible and comprehensible.

widest possible latitude that was consistent with its obligation to protect the plaintiff class. It is the Department that would decide the content of the draft regulations. Upon approval, those regulations would presumably be promulgated, and at that point all court involvement would cease. Any future violations by the Department would be of its own regulations, not of the court's order. Thus, far from setting up a system in which it would assume the role of an ongoing monitor, the district court merely ordered the Department, in effect, to supervise its own future behavior by issuing regulations on the contested subject of comprehensibility. Hence, the prospective aspects of the remedial order were well within the authority of the court, and it was therefore improper for the First Circuit to reverse them.¹¹

B. Restoration Of Wrongfully Withheld Benefits

As plaintiffs established in their main brief (at 38), the Food Stamp Program envisions that households will continue to receive their prior level of benefits during the implementation of any reduction or termination of those benefits. 7 U.S.C. § 2020(e)(10). Both defendants attempt to refute this proposition by noting that 7 C.F.R. § 273.15(k)(1) authorizes the recovery of payments made during the pendency of an unsuccessful appeal (federal reply br. at 33; state reply br. at 33). While there appears to be no specific statutory authority for this regulatory provision, even the regulation provides for recovery only between the originally noticed effective date of the action and the date of the adverse hearing decision. Neither defendant has responded to the fact that every single household that is properly provided with advance notice of an impending reduction or termination by definition receives a substantively incorrect, but statutorily authorized, level of bene-

¹¹ There is no merit to the defendants' suggestion that an amendment to 7 U.S.C. § 2020(d), Pub. L. 97-253, § 166 (1982), which precluded the Secretary's prior approval of certain administrative documents, somehow diminished the remedial power of the district court. Nothing in the legislation evinces such an intention. Indeed, Congress explicitly excepted from the amendment any materials which "conflict with the rights . . . to which a household is entitled."

fits during the advance notice period. 36 Fed. Reg. 20146 (October 16, 1971).

Indeed, when not embroiled in litigation, the Secretary himself recognizes that the previous level of a household's benefits may in fact remain the benefits to which it is entitled pending implementation of even a mass change. The food stamp regulations, for example, allow a state 120 days to implement recurring mass change reductions due to cost-of-living increases in social security and SSI payments (the "more common type" of mass change according to the Secretary. Reply br. at 18 n.12). 7 C.F.R. § 273.12(e)(3)(ii). Further, § 272.1(g)(16)(ii) allowed states to delay implementation of the Congressionally mandated reduction in the program's resource limits until the expiration of a household's certification period. This of course resulted in families who no longer qualified for the program receiving benefits for up to a year during implementation of the change.

In enacting the OBRA amendments to the Food Stamp Act, Congress did not indicate that it wished to alter this normal pattern of implementation. It said nothing to induce the Secretary's sudden concern with instant applicability. Rather, Congress explicitly recognized that the amendments would not be self-effectuating. The legislation specifically provided that any timetable for applying the program changes should be established "taking into account the need for orderly implementation."¹² Pub. L. 97-35, § 117 (1981).

The Secretary's inconsistency in this regard has been judicially recognized. In *Levesque v. Block*, 723 F.2d 175,

¹² This Congressional concern for orderly implementation is reflected in 7 U.S.C. § 2013(c), which requires that program rules be issued in accord with the Administrative Procedure Act, and in § 2020(e)(10), which sets forth how any of those rules that require a reduction or termination of benefits, once issued, are to be implemented with regard to a given household.

Whether there would be a constitutional problem if, as the Secretary hypothesizes (reply br. at 18), Congress specifically mandated the

186-187 (1st Cir. 1983), the court rejected the argument that Congress, even by specifying the effective date of certain program amendments, made those program changes self-implementing. Noting that the Secretary's new-found position conflicted with his prior practice, the Court held that participants' benefits could not be reduced based upon the amendments until properly implemented. The Court then ordered that benefits reduced prior to proper implementation had to be retroactively restored.¹³ *Levesque*, 723 F.2d at 189.

Thus, § 2023(b) simply cannot be read to exclude from its coverage benefit reductions effectuated prior to lawful implementation. As plaintiffs demonstrated in their main brief at 37-43, not only would such a construction conflict with the basic structure of the program, it would also do violence to the plain language of the statute. Nonetheless, both defendants argue that the term "wrongfully withheld" in § 2023(b) should be found to have exactly the same meaning as the phrase "wrongfully denied or terminated" found in § 2020(e)(11) of the Act. This contention, however, overlooks the fact that "[s]ince these terms are used in similar context within the same [act], it is logical to assume that Congress intended that the terms have different and distinct meanings." *Smith v. Ithaca Corp.*, 612 F.2d 215, 222 (5th Cir. 1980); *Complaint of American Export Lines*, 73 F.R.D. 454, 457 (S.D.N.Y. 1977); *Hoffman v. Joint Council of Teamsters*, 230 F. Supp. 684, 691 (N.D. Cal. 1962). Given this, it is clear that § 2023(b) was intended to be the broader of the two provisions.

immediate implementation of a program change without notice to the affected households is a question not raised by this case. In fact, it is an issue unlikely to be raised in any case, since such a mandate, whether or not constitutionally permissible, would almost certainly prove administratively impossible.

¹³ Although the *Levesque* decision did not specifically refer to 7 U.S.C. § 2023(b), the district court order, which was affirmed with minor modification, specifically relied upon § 2023(b) for the restitution remedy. *Levesque v. Block*, Civ. Action No. C 82-437-L (D.N.H. orders entered 3/31/83 and 4/28/83).

Further textual support for this conclusion is found in the final phrase of § 2023(b), in which Congress indicates that a "possible loss" can trigger the restoration remedy (emphasis added). Significantly, the parallel clause of § 2020(e)(11), while otherwise using virtually identical language, does not contain the adjective "possible." Consequently, to read the two sections co-extensively is to render superfluous the use of the word "possible" in § 2023(b), a result that conflicts with well-settled rules of statutory construction. *U.S. v. Menasche*, 348 U.S. 528, 538-539 (1955); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-339 (1979). In light of this, it is clear that the phrase "wrongfully withheld" in § 2023(b) encompasses the reductions and terminations at issue here.

The Secretary's effort to distinguish *Sampson v. Murray*, 415 U.S. 61 (1974), which supports the above conclusion, is unavailing. His argument is premised on the fact that the civil service regulations involved there specifically allowed for the appeal of alleged procedural violations (reply br. at 34). This is no distinction at all. Not only the relevant food stamp regulation, but the Act itself, grant the right to a fair hearing to "any household aggrieved by the action of the State agency under any provision of its plan of operation as it affects the participation of such household in the food stamp program. . . ." 7 U.S.C. § 2020(e)(10); 7 C.F.R. § 273.15(a). Pursuant to these provisions, food stamp participants regularly appeal proposed actions because they have, *e.g.*, received inadequate notice, and in Massachusetts at least, the Department of Public Welfare regularly upholds such "procedural" challenges by reinstating benefits until proper notice is issued. *See*, annexed hereto as Appendix A, Department Fair Hearing Appeal #104885 (benefits reinstated solely because no notice of reduction sent to household); Appeal #111946 (benefits reinstated solely because English language notice sent to a Spanish-speaking household); and Appeal #61835 (benefits restored because notice of termination did not include reason and citation supporting the action). Consequently, the *Sampson* case cannot be distinguished as the Secretary has suggested.

Further, *Sampson* is not the sole authority for finding that benefits withdrawn without proper notice are wrongfully withheld. The decision in *Chavis v. Heckler*, 577 F. Supp. 201 (D.D.C. 1983), stands for the same proposition. There, after analyzing the analogous SSI notice and hearing requirements, the court held that those provisions create a continuing entitlement to benefits until a recipient is provided notice and an opportunity to be heard regarding the basis for any termination. While the court agreed with the Secretary that Mr. Chavis was not in fact disabled during the relevant period, it nonetheless found that Congress intended benefits to be paid until a proper termination was accomplished. It therefore specifically held that the benefits terminated prior to the receipt of notice had been "wrongfully withheld" and ordered them restored. *Chavis* at 206.

Hence, it can be seen that the defendants' attempts to restrict the scope of § 2023(b) are unpersuasive. However, even if one were to ignore that section entirely, the district court's restitution order would nonetheless constitute an appropriate exercise of its equitable jurisdiction to effectuate the requirements of § 2020(e)(10). The Secretary's reliance upon *Schweiker v. Hansen*, 450 U.S. 785 (1981) (*per curiam*), and *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), to dispute this contention is misplaced. In both those cases, individuals relied to their detriment upon information provided by agency officials which proved to be an inaccurate statement of the existing law. Reasoning that misstatements by government employees could not alter the statutory obligations of the United States, the Court refused to estop the government. However, in the present case, it is the defendants, not the plaintiffs, who are seeking to circumvent the procedures defined by Congress for reducing or terminating food stamp benefits. In these circumstances, the principles enunciated in *Hansen* and *Merrill* support the restoration of benefits reduced or terminated in contravention of the terms set out in § 2020(e)(10), even if in accomplishing those reductions the Department was merely relying upon the federal defendant's misreading of the Act.

Finally, for the first time in this entire case, the Secretary suggests that any restoration of benefits is precluded by the Eleventh Amendment and principles of sovereign immunity.¹⁴ However, this position is really nothing more than a restatement of his earlier argument that the Food Stamp Act does not authorize restoration of these benefits. Each contention is premised upon the assumption that neither respondent “has consented to be sued for retroactive benefits in excess of those authorized by Congress” (fed. reply brief at 30). However, what benefits have been authorized by Congress in §§ 2020(e)(10) and 2023(b) is precisely the issue in this case. Since each defendant readily admits that he is bound to restore benefits authorized by the Act (state reply br. at 35-36 n.23; federal reply br. at 39), applying sovereign immunity and Eleventh Amendment labels to the problem adds nothing in the way of helpful analysis.

The cases relied upon the Secretary in support of his sovereign immunity argument best demonstrate the above point. *United States v. Testan*, 424 U.S. 392 (1976), was an action under the Classification Act, which this Court found did not provide for the payment of any specific benefits by the federal government. *Testan*, 424 U.S. at 401-402. In contrast, this Court has recently noted that sovereign immunity does not attach to “a suit ‘for money improperly exacted or retained’ or a claim based upon a regulation that promises money.” *Army and Air Force Exchange Services v. Sheehan*, 456 U.S. 728, 739 n.11 (1982) (quoting *Testan* at 401-402); see also, *United States v. Clark*, 445 U.S. 23, 34 n.11 (1980), *United States v. Mitchell*, ____ U.S. ____, 103 S. Ct. 2961, 2972-73 (1983).

Because § 2020(e)(10) of the Food Stamp Act promises that households “shall continue to participate and *receive benefits*” (emphasis added) at their prior level pending proper imple-

¹⁴ Before the First Circuit, the Secretary argued that it would be inappropriate for the court to reach the Eleventh Amendment issue because it is by no means certain that the award would ever be paid by the state. The Department, which advanced an Eleventh Amendment argument below, has now abandoned it.

mentation of a change in those benefits, the current case properly falls within the ambit of the *Sheehan* and *Mitchell* cases, not within that of *Testan*. The plaintiffs are merely seeking restitution of what Congress has promised them, not compensatory damages for the violation of their procedural due process rights.¹⁵ This exact analysis was applied by the court in *Chavis v. Heckler*, 577 F. Supp. at 205-206, in rejecting the federal government's claim that sovereign immunity barred the restoration of disability benefits that had been terminated without adequate notice. Thus, sovereign immunity does not bar the relief granted by the district court.

Nor does the Secretary's Eleventh Amendment argument fare any better. The cost of food stamp benefits, as the First Circuit noted and the Secretary admits (reply br. at 28 n.23), is borne by the federal government, not the states [PA 36 n.6]. 7 U.S.C. § 2013(a). The possibility that the Secretary might attempt to recover the cost of such benefits from the state in a separate administrative proceeding does not insinuate the Eleventh Amendment into this case. *Edelman v. Jordan*, 415 U.S. 651, 665 (1974), upon which the Secretary relies, held that, absent a waiver, the Eleventh Amendment precludes retroactive relief when the award must "inevitably come from the general revenues of the State . . ." (emphasis added). As the Secretary has himself conceded that he does not even know if he would seek to recover from Massachusetts the value of the restored benefits (reply br. at 28-29 n.23), it is certainly far from inevitable that the cost of such benefits will ever be charged to the state treasury. Consequently, even leaving aside the question of what benefits are authorized by the Food Stamp Act, the Eleventh Amendment would not present a problem in this case.

¹⁵ It is this distinction that renders *Carey v. Piphus*, 435 U.S. 247 (1978), inapposite. Because neither science nor philosophy has yet discovered a way to restore lost time, the plaintiffs in *Carey* were by definition seeking damages, not restitution of something they claimed had been wrongfully removed.

In light of the above discussion, it can be seen that the defendants have offered no persuasive reasons why the relief afforded by the district court should not be reinstated.

CONCLUSION

For the reasons set forth above and in plaintiffs' main brief, the judgment of the court of appeals should be affirmed on the merits, but the relief entered by the district court should be reinstated.

Respectfully submitted,

STEVEN A. HITOV
(Counsel of Record)

J. PATERSON RAE
Western Mass. Legal Services
145 State Street
Springfield, MA 01103
(413) 781-7814
Counsel for Parker, et al.

APPENDIX

MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE

APPEAL DECISION—Approved

CSA: PITTSFIELD

APPEAL NO. 104885

CATEGORY: FOOD STAMPS

NAME: DELETED

ADDRESS: Pittsfield, MA 01201

DECISION DATE: SEP 12 1983

DATES: Filing-8/22/83, Hearing-9/8/83

JURISDICTION:

The Department reduced the household's August Food Stamp benefits without providing the household with advance notice.

The appellant filed this appeal on 8/22/83, and, therefore, it is timely (106 CMR 367.100). (Exhibit A).

Department action which effects participation in the Food Stamp program is grounds for appeal.

The reduction of Food Stamp benefits is grounds for appeal (106 CMR 367.025).

ACTION BY DEPARTMENT:

The Department reduced the appellant's Food Stamp benefits without providing the appellant advance notice of adverse action.

ISSUE:

Was the Department required to provide advance notice before decreasing the appellant's Food Stamp benefits?

SUMMARY OF EVIDENCE:

The Department representative testified that a review of the appellant's case was conducted in June and that there was a change in the appellant's shelter expenses. The representative further testified that a notice to the recipient was not gener-

ated because the computer did not accept a shelter charge with a notice of review.

The representative submitted into evidence a copy of "Field Operations Message" dated August 8, 1983 (Exhibit B) and AP-83-26 (Exhibit C).

The appellant stated she did not learn that her Food Stamp benefits were to be reduced until receiving reduced benefits in August.

The appellant's representative submitted into evidence copies of Department regulation 106 CMR 364.860, 366.200 and 210 and federal regulation Title 7 Section 273.12(c)(2) and Section 273.13.

FINDINGS OF FACT:

In June of 1982 the Department determined that the appellant was no longer entitled to a heating standard utility allowance in accordance with revised Food Stamp regulations (not disputed). On or about July 1, 1983 the Department submitted a Food Stamp transaction on the same turn-around document (TD) with a "Notice of Review."

Because the Monthly Reporting System (MRS) does not generate a notice to the recipient when a Food Stamp transaction is submitted on the same T.D. with a "Notice of Review," the system did not send the appellant notification (See Exhibit B).

The appellant received reduced allotments for August and September.

CONCLUSIONS OF LAW:

Department Food Stamp regulations provide that before taking action to reduce or terminate a household's benefits during the certification period, the worker shall provide the household with advance notice of adverse action. See 106 CMR 366.200.

In certain circumstances benefits may be terminated or decreased without providing advance notice. See 106 CMR 366.210.

The exceptions to advance notice requirements set forth in section 366.210, are not applicable in the appellant's case.

The referee concludes that the appellant was/is entitled to a "Notice of Adverse Action" and the right to a prereduction hearing prior to reducing her benefits.

The appellant is entitled to notification containing the information as set forth in Department regulation 106 CMR 364.860.

The referee concludes that the Department incorrectly failed to provide proper notice prior to reducing the appellant's benefits and that this procedural defect requires that the Department reinstate the appellant's prior level of benefits and restore lost benefits. The Department may then provide notice of adverse action in accordance with Department regulation prior to taking action to reduce benefits.

The appeal is approved.

ACTION FOR CSAO:

Reinstate prior level of benefits. Restore benefits lost for months of August and September. Proceed to take new action to reduce with adequate prior notice.

/s/ Edward J. Collins

EDWARD J. COLLINS

WELFARE APPEALS REFEREE

copy: Janice Broderick, WMLS
Pittsfield, MA

**MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE
APPEAL 111946**

JURISDICTION:

An English language notice dated 2/14/84 was sent to the appellant stating that the Department was planning to terminate her AFDC benefits because: The child(ren) is not deprived of parental support—106 CMR 303.300. Your Food Stamps will end on 3/4/84 because you no longer meet the eligibility requirements of the Food Stamp Program—106 CMR 366.100 (Exhibit A).

The appellant filed this appeal on 2/24/84; therefore, it is timely (106 CMR 343.140(B), 367.100), (Exhibit A).

The termination of assistance is grounds for appeal (106 CMR 343.230(A), 367.025).

ACTION:

The Department terminated the appellant's AFDC and Food Stamp benefits on 3/4/84 (See Exhibit A).

ISSUE:

Whether the appellant should have been sent a Spanish language notice of termination.

SUMMARY OF EVIDENCE:

The Department representative testified that the appellant's initial application for AFDC of 2/14/82 showed that she spoke no English and that she was "Spanish."

FINDINGS OF FACT:

The record shows and I so find that the appellant is Spanish speaking and that the Department knew, and had reason to know, that she is Spanish speaking (See Exhibit B) when it sent her a notice of termination employing the English language (Exhibit A).

CONCLUSIONS OF LAW:

Under the Stipulation in *Casul v. Minter*, the Department is obligated to send Spanish language notices of reduction, suspension and termination to clients whom it knows, or has reason to know, are Spanish speaking. The Stipulation further provides that when the Department sends an English language notice to such a client it is the equivalent of the client's having received no notice at all.

Since I have found that the appellant is Spanish speaking and that the Department, while knowing she is Spanish speaking, sent her an English language notice of termination, I conclude in accordance with the Stipulation, that the appellant's receipt of the English language notice is the equivalent of her receiving no notice at all.

Therefore, the Department's action to terminate the appellant's AFDC and Food Stamp benefits on the basis of the information contained in its English language notice is overturned. This appeal is, hereby, approved.

ACTION FOR DEPARTMENT:

CSAO—Reinstate the appellant's AFDC and Food Stamp benefits effective 3/4/84.

/s/ Leo Jeghelian

LEO JEGHELIAN

WELFARE APPEALS REFEREE

MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE

APPEAL DECISION: Approved

WSO: 285-Springfield

RO: Springfield

CAN: 263

APPEAL NO.: 61835

CATEGORY: 02-AFDC

NAME: DELETED

ADDRESS: Springfield, Ma.

DATES: Filing-10/29/80, Hearing 11/24/80, 11/17/80

JURISDICTION:

Notice dated 10/6/80 was sent to the appellant stating the Department was planning to reduce her AFDC and Food Stamp assistance. Manual Citation: 304.320 (Exhibit A). The reduction of assistance is grounds for appeal and since this appeal was filed on 10/29/80 it is, therefore, timely 106 CMR 343.140 and 343.230.

ACTION BY DEPARTMENT:

The Department has reduced the appellant's AFDC grant.

ISSUES:

Whether the notice of reduction is proper in that it affords due process and complies with the regulations of the Department.

SUMMARY OF EVIDENCE:

The Department representative testified the basis for the reduction is the removal of one of appellant's son from the AFDC grant. The representative explained appellant's son was attending the Skill Center, came into the WSO requesting to be removed and informed the representative it was okay with appellant, therefore she sent the NFL #10.

The appellant stated through her legal advocate that; 1) The notice of adverse action was insufficient because it failed to state a reason for the action; and 2) The action was improper

because the Department failed to follow their regulations in this matter. Appellant testified she came in after the check was reduced and asked for an explanation.

Appellant's legal advocate asked that the record be held open for submission of Exhibit B, 45 CFR & 205.10 (a)(1)(ii) and (a)(4)(i), and Exhibit C, *Goldberg v. Kelly*, 90 S.Ct. 1011, (1970). The request was granted until November 24, 1980 at which time the record closed as Exhibits B & C had been submitted.

FINDINGS OF FACT:

The NFL #10 sent to the appellant is lacking a Summary of Evidence relative to the AFDC reduction and the Food Stamp reduction. The Manual Citation supporting the Food Stamp reduction is missing as well.

The Department did not discuss the reduction with the appellant prior to the NFL #10 but relied upon the statement made by appellant's son.

MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE**CONCLUSIONS OF LAW:**

106 CMR 302.500 sets forth the information a notification of proposed action must include. Among the information required are: a) The reasons for the proposed action and b) The citation to the regulations supporting the action. It has been found that the reason and citation were missing, the notice is therefore insufficient, failing to satisfy due process requirements in that it does not comply with Department regulations to insure due process.

"Except in specified circumstances . . . membership in the assistance unit is optional. The applicant or recipient must be informed of the advantages and disadvantages of the alternatives before she makes a decision." 106 CMR 304.320. Appellant was not given the opportunity to weigh the pro and con of having her son removed from the grant through discussion with the Department. Discussion with the appellant in this instance after the reduction has taken effect does not negate the Department's obligation prior to the proposed action. The Department's failure to comply with 106 CMR 304.320 and 302.500 has resulted in a loss of both AFDC and Food Stamp benefits to the appellant. The appeal is approved.

ACTION FOR WSO:

Restore benefits lost from the date of reduction to the date of the implementation of this decision. 106 CMR 343.620. The Department should discuss the advantages and disadvantages of appellant's son remaining a member in the assistance unit with appellant as soon as possible.

/s/ Lucille Myles

LUCILLE MYLES

WELFARE APPEALS REFEREE

copy: Henry Korman, Esq.
W.M.L.S.
145 State Street
Springfield, Ma. 01105